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Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

CIRCLE LINE SIGHTSEEING YACHTS, INC.,
Petitioner,

against—

THE CITY OF NEW YORK,
Respondent.

In the Matter of

The Petition of CIRCLE LINE SIGHTSEEING YACHTS, INC., as Owner of the motor vessel SIGHTSEER VIII, in a cause of exoneration from or limitation of liability for damages arising out of a collision in the Harlem River on September 6, 1956, between said vessel and the Madison Avenue Bridge.

CIRCLE LINE SIGHTSEEING YACHTS, INC.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Circle Line Sightseeing Yachts, Inc., owner of the motor vessel SIGHTSEER VIII, prays that a writ of

certiorari issue to the United States Court of Appeals for the Second Circuit to review judgments of that Court entered on December 6, 1960, modifying interlocutory decrees entered in these causes in the United States District Court for the Southern District of New York and remanding the limitation cause for further proceedings.

Opinions of the Courts Below

The opinion of the District Court (R. 1-12a) is not reported. The opinion of the Court of Appeals (R. II-103a; App. A-1) is reported at 283 F. 2d 811.

Jurisdiction

The opinion of the Court of Appeals for the Second Circuit was filed November 9, 1960 (R. II-103a; App. A-1). Within the period of time prescribed by Rule 25 of the Rules of the Court of Appeals a petition for rehearing was filed by petitioner, which petition was denied by order of the Court of Appeals dated December 6, 1960 (R. II-126a).

Jurisdiction of this Court to review the judgments of the Court of Appeals by writ of certiorari is invoked under Section 1254(1) of Title 28 U. S. Code.

The Questions Presented for Review

1. Whether a Court of Appeals, in reviewing an admiralty decree and upon determining that an issue of fact that had not been presented to the District Court on the trial is material to the controversy, may find facts from the record of the trial in which that factual issue had not been litigated; or should, under *McAllister* v. *United States*,

348 U. S. 19, remand the cause to the District for appropriate findings.

2. Whether a Court of Appeals, in reviewing an admiralty decree, may consider a question presented for the first time on appeal, and hold the District Court in error with respect to the question that had not been presented for its consideration; or should remand the cause to the District Court for appropriate proceedings.

3. Whether, in reviewing a decree in a cause of marine collision, a Court of Appeals, upon determining that a factual issue of statutory violation that had not been presented to the District Court on the trial is material to the controversy and upon finding facts from the record of the trial in which that factual issue had not been litigated, may then conclude from that record that a party to the collision, exonerated by the District Court's decree, had violated the statutory obligation and that such party, found in fault for the first time upon appellate review, had failed on the District Court trial to sustain the burden, imposed by the rule stated in *The Pennsylvania*, 86 U. S. (19 Wall.) 125, of proving that the statutory violation could not have caused or contributed to the collision and was thus in partial blame for the collision, despite the fact that the party newly held in blame had not, until the decision of the Court of Appeals, had cause to undertake the burden imposed by the Pennsylvania rule; or should, upon determining the existence of a potential statutory fault of a party exonerated by the District Court decree, remand the cause to the District Court for plenary proceedings consistent with the doctrine of *The Pennsylvania*, thereby to afford that party a hearing on the issue of statutory fault and, if need be, the opportunity to undertake and sustain the burden imposed by the Pennsylvania rule.

Statement of the Case

A collision September 6, 1956 between petitioner's sightseeing vessel and the rotating span of respondent's Madison Avenue Bridge caused damage to both bridge and vessel and injuries to several passengers on the vessel. Pursuant to Section 1333 of Title 28, U. S. Code, petitioner filed a libel in admiralty against respondent in the United States District Court for the Southern District of New York to recover its losses, and commenced in that Court a proceeding under Section 185 of Title 46, U. S. Code, seeking exoneration from or limitation of liability on its part for losses to others.

The proceedings were consolidated for trial. The District Court, having concluded that the casualty occurred without fault on the part of petitioner and solely as a result of the negligent conduct of respondent's bridge operator in opening the bridge into the path of the oncoming vessel (R. I-15a), entered decrees exonerating petitioner from liability (R. I-6a) and awarding it recovery of its damages from respondent (R. I-4a). Further, it took the precautionary measure of finding that the accident happened without managerial fault on the part of petitioner and therefore concluding that petitioner would be entitled to limitation of liability under Section 183 of Title 46, U. S. Code, in the event that an appellate court should disagree with its conclusion as to petitioner's right to exoneration (R. I-18a).

The Court of Appeals approved the District Court's conclusion that the bridge operator's failure to protect petitioner's vessel on her attempted passage through the bridge draw was a proximate cause of the casualty, and added that an underlying cause was the neglect of respondent

effectively to devise a means of warning vessels of a prospective opening of the bridge (R. II-106a; App. A-3).

It found, however, that petitioner was negligent in failing to maintain a proper lookout on its vessel (R. II-108a; App. A-5). On that ground it ordered the decrees modified to deny petitioner exoneration from liability and to provide for division of damages, and remanded the limitation cause with instructions that the District Court, in view of the Court of Appeals' finding of petitioner's negligence as to lookout, review its own finding of petitioner's lack of managerial fault (R. II-110a; App. A-7).

In holding petitioner *in pari delicto* with respondent for the accident, the Court of Appeals drew from the trial record its own finding that the vessel's lookout was in fact inadequate, and to that finding applied the rule announced by this Court in *The Pennsylvania*, 86 U. S. (19 Wall.) 125, under which, as the Court of Appeals said, "failure to maintain a proper lookout placed upon the negligent party the burden of showing that such failure did not cause and could not have caused the accident" (R. II-109a; App. A-5).

But the question of petitioner's lookout had not been raised in the District Court. Respondent did not contend on the trial that there was inadequacy of lookout. The District Court was not asked to consider and determine that issue, and no mention of it was made in the memorandum decision (R. I-12a) or in the findings of fact and conclusions of law (R. I-19a).

Until the Court of Appeals determined *de novo* that untried factual issue, petitioner had no reason to assume the burden of proving that failure as to lookout—if there were failure—could not have caused or contributed to the collision. When the Court of Appeals made that determination, it concluded from a trial record that had not,

been and could not have been fairly made that petitioner had failed to sustain a burden that it had not had the opportunity to assume.

I

The decision of the Court of Appeals is in conflict with the decision of this Court in McAllister v. United States, 348 U. S. 19.

In *McAllister* v. *United States*, 348 U. S. 19, this Court ruled that a factual finding of an admiralty court, sitting without a jury, may be disturbed on appeal only if it is "clearly erroneous," and that such clear error is present only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Implicit in that determination is the principle that the admiralty trial court is presumptively correct in the performance of its function as trier of the facts, not only as to the facts that it finds, but also as to its appraisal of the factual issues to be determined.

Here the Court of Appeals, since it was of the opinion that a factual issue not considered below was material to the controversy, should properly have remanded the cause to the trial court for appropriate findings. It was in clear error under the McAllister rule in extracting its own findings from a trial record in which that factual issue had not been explored.

II

The Court of Appeals was in error in modifying a decree on grounds that had not been raised in the District Court.

The Court of Appeals, after making its independent findings of fact with respect to lookout, concluded that peti-

tioner had been negligent. In doing so, the Court violated the principle, universally honored in the federal appellate courts, that an issue not decided in the District Court may not be raised for the first time on appeal.

As the Court of Appeals for the Eighth Circuit has said, in *Weiss* v. *Duro Chrome Corp.*, 207 F. 2d 298, 300:

> "The trial Court having had no opportunity of passing upon the question now for the first time presented cannot be charged with error in failing to do that which it was not requested to do."

To the same effect are the decisions of the Court of Appeals for the District of Columbia Circuit in *Brown* v. *Rudberg*, 171 F. 2d 831, and *American Air Export & Import Co.* v. *O'Neill*, 221 F. 2d 829.

III

The decision of the Court of Appeals is in conflict with the decision of this Court in The Pennsylvania, 86 U. S. (19 Wall.) 125.

In *The Pennsylvania*, 86 U. S. (19 Wall.) 125, this Court, concerned with the effect of violation by one of two colliding vessels of a statutory mandate regarding sound signals in fog, announced a most significant doctrine of admiralty, 86 U. S. 125, 136:

> "But when, as in this case, a ship at the time of a collision, is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

That doctrine contemplates a *presumption*, which under circumstances of statutory violation causes imposition of a proof burden on the offending vessel and casts liability upon her in the event that burden is not sustained. But *The Pennsylvania* established that the doctrine is designed to apply only to cases where the issue of statutory violation is in actual litigation in the trial court: there the statutory issue was fairly raised, and the party charged with fault sought unsuccessfully to bear the burden of the rule.

This Court has not suggested that an appellate court may, at once, detect a statutory fault not litigated below and on an empty record conclude forthwith that the party newly held in blame had failed to sustain the burden created by a presumption that would have arisen only had the point earlier been in issue.

But the Court of Appeals did that in this instance. Although the factual issue as to adequacy of lookout had not earlier been raised, the Court of Appeals entertained it, determined in a manner adverse to petitioner, and thereupon concluded that petitioner had failed to sustain the Pennsylvania burden.* In doing so, it effectively foreclosed petitioner from exercise of the right secured to it by this Court's doctrine to show that a statutory default—if such there was—could not have been related causally to the accident, *The Farragut*, 77 U. S. (10 Wall.) 334; *The Dexter*, 90 U. S. (23 Wall.) 69, and thus denied to petitioner the process that this Court has held to be due.

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*The reason given by the Court of Appeals for that conclusion was that ". . . it is quite possible that a lookout with no other duties could have seen the opening bridge earlier and either avoided the accident or at least diminished its severity" (R. 109a; App. A-6).

Conclusion

Petitioner respectfully submits that the reasons stated in this petition are of importance sufficient to justify review of the judgment of the Court of Appeals for the Second Circuit by writ of certiorari.

It prays, therefore, that the writ issue, and that, upon its review, this Honorable Court be pleased to order the judgment of the Court of Appeals reversed and these causes remanded for further proceedings consistent with the doctrine stated by this Court in *The Pensylvania*, 86 U. S. (19 Wall.) 125, and such other and further relief as to this Court may seem proper.

Respectfully submitted,

WARNER PYNE,
WILLIAM A. WILSON,
Counsel for Petitioner.

ALBERT ROBIN,
Of Counsel.

Dated New York, New York,
March 1, 1961.

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 63-65—October Term, 1960.

(Argued October 14, 1960 Decided November 9, 1960.)

Before:

CLARK, MAGRUDER, and FRIENDLY,
Circuit Judges.

CLARK, *Circuit Judge:*

Libelant Circle Sightseeing Yachts, Inc., owner of the sightseeing vessel Sightseer VIII, sued respondent City of New York in admiralty for damages resulting from a collision on September 6, 1956, between the vessel and the City's Madison Avenue Bridge, located at 138th Street across the Harlem River. Circle Line has also brought a limitation proceeding, in which claims were filed by a large number of passengers, and by the City for damage to the bridge. A third libel for personal injuries was originally filed against the City by Captain Smith, master of the vessel, and upon his death in 1958 has been prosecuted with an added death damage claim by his administratrix, Barbara A. Smith. The libels were consolidated for trial before Judge Dimock, who held the City solely liable for all damages and granted the Circle Line's petition for exoneration from liability. He then referred the claims in all three cases to a Special Commissioner for the ascertainment of damages due from the City. From the three resulting interlocutory decrees the City appeals.

Opinion of the Court of Appeals

The Madison Avenue Bridge is a drawbridge containing a center span supported on a pivot. The center span can rotate to a position perpendicular to the position of the closed bridge, and thereby open up two lanes of traffic on the river, one on each side of the center pivot. On the afternoon of September 6, 1956, the Sightseer VIII with its passengers had left its pier in North River for its circle tour around Manhattan Island and was proceeding north on the Harlem River toward the Madison Avenue Bridge, when its captain observed a tug and tow waiting on the opposite side of the bridge for it to open. The tug had signaled for an opening, and the bridge was in the process of being cleared for traffic. Despite the obvious preparation for opening, the Sightseer VIII, which was less than two minutes from the bridge at its then speed of 4.7 knots (including current), determined to go under the bridge. So long as the bridge was closed, the low-built Sightseer VIII was capable of passing under it without damage. But the bridge contained low-hanging projections which could collide with the boat if the bridge were to open while the boat were attempting to pass under it.

The bridge operator, having casually noticed the Sightseer VIII coming toward the bridge, determined to open the bridge anyway, on the assumption that the captain of the vessel could be trusted to take care of himself. By the time the captain saw the bridge opening and set the engines in reverse, it was too late to stop and the vessel collided with the half-open bridge.

The underlying cause of the collision was the City's failure to devise an effective means of warning approaching ships of the prospective opening of the bridge. The City's bridge engineer, who testified as an expert witness,

stated that the underhanging projections from the opened draw could damage those boats which were low enough to pass under the closed bridge without danger. Thus the City had, or should have had, notice of the danger. When asked whether the City had developed any signal system to protect such boats, the engineer testified that the bridge operator would delay the opening until the boat had passed, that he had seen this alone many times, and that he had no doubt that this was the practice. Thus, instead of developing an adequate signal system to warn approaching boats, the City depended upon the bridge operator to watch for such boats and to delay opening the bridge if they were too close. The operator here failed to make any effort to protect the Sightseer VIII, and this negligence was a proximate cause of the collision.

The failure to provide an adequate signal system was similarly negligence and a proximate cause of the collision. That Army regulations relating to the bridge do not require any warning system, other than an exchange of whistle signals with the boat seeking to pass, does not excuse the City's conduct. In *Oregon Washington Bridge Co.* v. *The Lew Russell, Sr.*, 9 Cir., 196 F. 2d 707, the Ninth Circuit held that an additional signal light should have been installed to warn ships of danger in cases where the regular light went dead, and that compliance with Army regulations (which did not require an auxiliary signal) did not dispose of the duty to use due care.

The City argues that the captain of the Sightseer VIII, in continuing his progress at 4.7 knots despite the obvious preparations for the opening of the bridge, must at least be deemed contributorily negligent. Under most circumstances this would be so, since the captain would have no

right to expect the bridge to wait for him to pass. *Cf.* 33 CFR § 203.160(e); 33 U. S. C. §§ 494, 499; *The Majestic*, 4 Cir., 80 F. 2d 879; Griffin, Collision § 263 (1949). But in view of the established practice in this case for bridge operators to wait to let approaching ships pass, the Sightseer captain was justified in assuming that the opening of the bridge would be delayed.

The City asserts that the accident was proximately caused by the Sightseer VIII's violation of the Narrow Channel Rule, 33 U. S. C. § 210, which provides: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to * * * the starboard side * * *." The Sightseer VIII approached the Madison Avenue Bridge after passing through the Bronx draw of a railroad bridge about 900 feet to the south, the Manhattan draw of that bridge being closed for construction purposes. The tug and tow which was awaiting the opening of the Madison Avenue Bridge was on its opposite or north side. The tug and the Sightseer VIII then exchanged signals for a starboard to starboard passing, in which both vessels would veer to their portside. The Sightseer VIII thus prepared to go under the Manhattan side of the Madison Avenue Bridge, and was struck as the center span swung out in a counterclockwise direction toward the vessel. Had the Sightseer VIII kept to starboard and taken the Bronx draw, the bridge would have been swinging away from the vessel and the accident would probably have been avoided.

The court below, however, found no violation of the Narrow Channel Rule, because a custom had arisen, in view of the set of the tide and the closing of the Manhattan draw of the railroad bridge, for upgoing vessels to turn to the portside of the river. There was testimony that

the obstruction in the middle of the river under the railroad bridge, which obstruction has since been removed, adversely affected the tides. Furthermore, the closing of the Manhattan draw made it necessary for southbound ships to move to their portside or the Bronx side of the river before passing under the railroad bridge. While custom alone does not justify departure from the important Narrow Channel Rule, these peculiar and quite temporary circumstances support a finding that adherence to the rule here was not "safe and practicable." In any event, whatever the conclusion as to Captain Smith's action in turning to the left, the bridge operator had no right to fail to observe the course of the vessels; and he should have been aware of their change of course.

On another ground, however, the libelant also must be held negligent, namely, the failure to maintain a lookout. "Steamers navigating in the thoroughfares of commerce must have constant and vigilant lookouts" who have no other duties. *Chamberlain* v. *Ward*, 62 U. S. 548, 570; Griffin, Collision §§ 102, 103 (1949). The person in control of navigation cannot fulfill this function, because his work in managing the ship prevents his giving undivided attention to possible obstructions or dangers. *Chamberlain* v. *Ward*, *supra*, 62 U. S. 548; Griffin, Collision § 109 (1949). In the present case the captain was the only person acting as a lookout, and he was engaged in navigating the vessel. Mate Gray, who was in the pilothouse with the captain, admitted he was not looking. The failure to maintain a proper lookout was negligence. See 33 U. S. C. § 221.

Under the rule of *The Pennsylvania*, 86 U. S. 125, 19 Wall. 125, failure to maintain a proper lookout placed upon the negligent party the burden of showing that such failure did not cause and could not have caused the accident. *Mer-*

ritt-Chapman & Scott Corp. v. *Cornell S.S. Co.*, 2 Cir., 265 F. 2d 537, 539. The testimony of the Sightseer captain that he started to reverse as soon as he saw the bridge opening is not sufficient to sustain this burden. In view of the fact that the ship had almost stopped by the time it hit the bridge, it is quite possible that a lookout with no other duties could have seen the opening bridge earlier and either avoided the accident or at least diminished its severity. Libelant argues that it is difficult to see the bridge opening, but this seems to increase rather than decrease the importance of an independent lookout. *The Dexter*, 90 U. S. 69, 23 Wall. 69, and *The Farragut*, 77 U. S. 334, 10 Wall. 334, cited by libelant to support its contention that a lookout would not have helped, presented a situation where the obstruction was seen in sufficient time to avert the danger through skillful navigation, so that the lack of good navigation was the proximate cause of the accident. Here the danger was not seen in time to avert the collision through skillful navigation.

We find, therefore, that the collision was caused by mutual fault; and that the decree below should be modified for division of damages. The damages sustained by the two negligent parties should be totaled, and the party suffering the lesser damage will then be liable—subject to possible limitation of liability, as referred to below—for an amount necessary to equalize the damages suffered by the two. *The North Star*, 106 U. S. 17; Gilmore & Black, The Law of Admiralty 402 (1957). Liabilities to third parties, even though they may have claimed against only one tortfeasor, are customarily includible in damages sustained for purposes of the above computation. *The Albert Dumois*, 177 U. S. 240, 255-260; Gilmore & Black, The Law of Admiralty 438 (1957). It will be the function of the court

below on remand and after appropriate hearing to instruct its special commissioner as to the disposition of claims by or on behalf of passengers or to provide otherwise for their disposition.

With respect to the issue of limitation of the shipowner's liability, the court below found that the accident occurred without managerial fault upon the part of the shipowner; and hence it was entitled, if not to exoneration, at least to limitation of liability. But this finding was made at a time when the accident was believed to have occurred without any fault whatsoever upon the part of the Sightseer VIII. In view of our finding that the Sightseer VIII was negligent in failing to maintain a proper lookout, we think it only just that the court now review its finding of lack of managerial fault after such further hearing as it shall deem appropriate.

Interlocutory decree modified to provide for division of damages; action remanded for further proceedings in accordance with this opinion.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of November one thousand nine hundred and sixty.

Present:

HON. CHARLES E. CLARK,
HON. CALVERT MAGRUDER,
HON. HENRY J. FRIENDLY,
Circuit Judges.

CIRCLE LINE SIGHTSEEING YACHTS, INC.,
Libelant-Appellee,

v.

THE CITY OF NEW YORK,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is modified to provide for division of damages, and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court; with costs to the appellant.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of November one thousand nine hundred and sixty,

Present:

HON. CHARLES E. CLARK,
HON. CALVERT MAGRUDER,
HON. HENRY J. FRIENDLY,
Circuit Judges.

In the Matter of the Petition of CIRCLE LINE SIGHTSEEING YACHTS, INC., as owner of the Motor Vessel SIGHTSEER VIII,

Petitioner-Appellee,

v.

THE CITY OF NEW YORK,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment of the Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is modified to provide for division of damages, and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court, with costs to the appellant.

Supreme Court of the United States

October Term, 1960

No. _____

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1960

No.

CIRCLE LINE SIGHTSEEING YACHTS, INC.,

Petitioner,

—against—

THE CITY OF NEW YORK,

Respondent.

In the Matter of the Petition of

CIRCLE LINE SIGHTSEEING YACHTS, INC., as Owner of the motor vessel SIGHTSEER VIII, in a cause of exoneration from or limitation of liability for damages arising out of a collision in the Harlem River on September 6, 1956, between said vessel and the Madison Avenue Bridge,

CIRCLE LINE SIGHTSEEING YACHTS, INC.,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Petitioner seeks certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, unanimously modifying three interlocutory decrees in admiralty by the United States District Court for the Southern District of New York (Dimock, J.). The District Court had held the City of New York solely liable for the damage

resulting when petitioner's sightseeing vessel collided with the City's Madison Avenue Bridge. The Court of Appeals found that the collision was caused by mutual fault, and directed division of damages.

The action was thereupon remanded to the District Court for hearing by its special commissioner, who is now in the process of assessing damages for report to the Court. Only the Circle-Line seeks review by this Court; no petition has been filed in connection with the libel brought by the administratrix of the vessel's captain, nor by any of the passenger claimants in the limitation proceeding.

In a petition for rehearing to the Court of Appeals, and in a supplemental petition seeking a rehearing *en banc*, petitioner raised, in substance, every point it now raises in this Court. The Court of Appeals unanimously denied both motions.

Statement

This is a negligence case. The issue throughout has simply been whether the accident was caused by the negligence of the bridge operator or the negligence of the vessel's captain. What petitioner has done in its instant brief is to seek to convert one of the *facts* indicating its captain's negligence—the total and disastrous absence of a lookout on the Sightseer VIII—into a cardinal point of procedural and substantive law, requiring resolution by the highest Court in the land.

Nothing in this case warrants such consideration. As in any negligence case, there were here a myriad of facts from which negligence was spelled out. The facts as to

the neglect of a lookout were clear and uncontested in the trial record—as petitioner was fully aware, for it joined the City in briefing the lookout question before the Court of Appeals at the greatest length, without the slightest objection to consideration of the issue, and without claiming surprise of any sort.

What petitioner is urging here (as it did, for the first time, in its petition below for a rehearing) is that, merely because the facts evidencing its violation of this particular criterion of negligence were not fully isolated in the opinion and findings of the trial court, the Court of Appeals could not choose to give them such emphasis as it deemed proper, in resolving the simple legal issue of negligence, which has *never* changed throughout this proceeding.

Moreover, not only does the pivotal issue of negligence thus turn on facts fully explored by both sides, but petitioner has conspicuously failed—either in its petition for rehearing to the Court of Appeals or in its instant petition to this Court—to point to any way whatever by which it hopes to rebut the Court of Appeals' findings as to its negligence; and indeed, as we shall see, petitioner cannot possibly produce such rebuttal evidence.

Corrected Statement of the "Questions Presented"

Accordingly, even assuming that the two decrees challenged are final orders subject to review by this Court, the true question here is confined to whether, in a negligence case, where the record amply supports the finding of the Court of Appeals, the correctness of that factual finding presents a question which should be entertained by this Court. To so hold, this Court would have to ignore

its settled practice of refusing to grant certiorari to consider the specific facts of a case, and to do so, moreover, in a case of no important public interest or legal significance whatever.

Facts

The Court of Appeals found that this accident occurred when petitioner's vessel, the Sightseer VIII, attempted to go underneath the City's drawbridge, despite the fact that preparations were obviously being made to open for a tug on the other side of, and much closer to, the bridge; the bridge did in fact open, the Sightseer's captain observed the opening too late to stop, and his ship collided with projections underhanging the half-open bridge.

The Court concluded that the City had been at fault in failing to devise an effective means of warning ships like the Sightseer—which were low enough to pass under the bridge without an opening and which might decide to ignore the preparations for opening—that an opening was in fact about to begin. It further found, however, that the Sightseer's captain (who had assumed that the bridge operator, despite the preparations for opening for the other ship, would not in fact open until after the Sightseer had passed through) was negligent in failing to maintain a proper lookout; such a lookout, the Court pointed out, at the very least quite possibly might have seen the opening bridge in time to avoid or lessen the accident.

The minutes of the trial before the District Court (contained in the transcript of the record subpoenaed to this Court by the City) establish—not simply, be it emphasized, a failure by petitioner to show the presence of a lookout—

but affirmative and uncontested admissions, by every single member of the crew, that nobody whatever, except the captain, was looking or listening to the tug, the river, or the bridge, or was even aware of any need to do so. In its brief below, the City pointed to:

(a) The specific testimony of the mate that he "wasn't looking up the river" (Tr. 62-66); of one deckhand that he was looking at the passengers, and never at the bridge (Tr. 152-4, 160-4); of the second deckhand that he was below deck (Tr. 74-6), as were the chief engineer and the concessionaire (Tr. 78); and of the third deckhand that he was not looking, and saw nothing whatever, until after the captain did (Tr. 82-3, 90-93).

(b) The established admiralty rule that a vessel of this size required a lookout with no other duty [*Griffin*, Collision, § 109; *Chamberlain* v. *Ward*, 62 U. S. (21 How.) 548, 570; *The Colorado*, 91 U. S. 692, 698], and that the absence of such a lookout was equivalent to a statutory fault [*The Madison*, 250 Fed. 850, 852 (C. A. 2d, 1918); *Merritt-Chapman and Scott Corp.* v. *Cornell S.S. Co.*, 265 F. (2d) 537, 539 (C. A. 2d, 1959)].

(c) The uncontested record evidence of a long list of signals and observations missed by the captain, in his single-minded attempt to pass under the bridge before it opened for the tug; and the further evidence that the opening began a full minute before the collision, and that a proper lookout would have detected it long before the captain did, in ample time to stop the ship prior to the collision.

In its answering brief, petitioner did *not* deny—or even mention—a single one of the above points. Nor, it should

be most heavily stressed, did it complain for one moment that the lookout issue had not been raised below, had been less than fully explored at the trial, or came as any surprise to it whatever. Petitioner argued *solely* that a lookout would not have helped avoid the accident.

The Court of Appeals found that there was substantial evidence that a lookout might have seen the opening bridge earlier, and that certainly petitioner had not carried its burden, under the rule of *The Pennsylvania*, 86 U. S. (19 Wall.) 125 (1873), of establishing that the absence of a lookout could not have contributed to the accident.

We note that even in its instant brief, petitioner does not seriously attempt to deny that the Sightseer totally lacked an independent lookout. We can hardly blame petitioner, in view of the trial record. In addition to the citations already given, the Court will note the following references, in the course of the trial, to the presence, adequacy and need for a lookout (on questioning, be it observed, by the attorneys for both petitioner and the City)—Tr. 36, 39, 43, 44, 87-90, 188, 297-8, 331.

Petitioner's position comes down, in essence, to the claim that it must have a second opportunity to establish that the absence of a lookout could not have, under any circumstances, contributed to the accident; and that, unless it obtains that, this Court's decisions in *McAllister v. United States*, 348 U. S. 19 (1954) and *The Pennsylvania*, 86 U. S. (19 Wall.) 125 (1873), will somehow be violated. There is not the slightest merit to any of this, let alone such merit as to raise a substantial question for this Court.

ARGUMENT

The Total Irrelevance of the *McAllister* Case.

Petitioner devotes Point I of its brief entirely to an intricate theory, allegedly deduced from the "clearly erroneous" rule set forth in *McAllister* v. *United States*, 348 U. S. 19 (1954). Apart from everything else, we established in our brief below—and petitioner made not the slightest rebuttal—that the "clearly erroneous" rule was not applicable to this case.

First of all, the vast bulk of petitioner's evidence—including *all* its eyewitness evidence—consisted of testimony given before the Coast Guard a few days after the accident, by witnesses no longer available at the time of trial—whereas all of the City's evidence was by live witnesses, very much available for extensive and grueling cross-examination. Accordingly, the Court of Appeals was in at least as good a position as the District Court to examine the evidence afresh—and, moreover, was free from the inevitable distortion that the unbalanced situation as to witnesses must have imposed on the District Court.

The cases are unanimous that the "clearly erroneous" rule is not applicable where the bulk of crucial testimony in the trial court is in written form. See *Mottaghi* v. *Barkey Importing Co.*, 244 F. (2d) 238, 248 (C. A. 2d, 1957), cert. den. 354 U. S. 939 (1957); *Diamond State Tel. Co.* v. *Atlantic Refining Co.*, 205 F. (2d) 402, 408-9 (C. A. 3d, 1953); *Panama Transport Co.* v. *The Maravi*, 165 F. (2d) 719 (C. A. 2d, 1948).

Furthermore, even were this not so, it is well-settled that the Court of Appeals can review the decision below *de novo*

where, as here, the vital question was the standard of due care to be imposed on the Sightseer's captain and on the bridge operator. The ultimate determination of negligence, in other words, is a question of law, to which the "clearly erroneous" rule is not applicable. *Great A. & P. Co.* v. *Lloyd Brasileiro*, 159 F. (2d) 661, 665 (C. A. 2d, 1947), cert. den. 331 U. S. 836 (1947); *Verbeeck* v. *Black Diamond S. S. Corp.*, 269 F. (2d) 68, 70 (C. A. 2d, 1959).

All of this being true, we see no reason to discuss petitioner's theory spun from the "clearly erroneous" rule—a theory which is actually just another way of stating its contention that the Court of Appeals was limited to reviewing only those criteria of negligence isolated by the District Court, and was required to blind itself to all the rest of the record proof thereon. To that remarkable contention we now turn.

The Finding of the Court of Appeals That Petitioner Was Negligent Was Wholly Supported by the Record; Nor Should This Court Be Burdened By Being Asked to Look Into Any Such Question.

We believe that we have established the ample record support for the Court of Appeals' finding that the Sightseer possessed no independent lookout of any sort, and that such a lookout might well have prevented or mitigated this accident. Even the "clearly erroneous" rule, had it been applicable, would have been fully met by this record. In any event, the correctness of the Court of Appeals' findings surely do not present a question requiring review by this Court.

Petitioner's attempt to avoid the obvious lack of any substantial question in this connection, by insisting on the

Court of Appeals' powerlessness to consider the lookout aspect of the Sightseer's negligence, solely because the trial judge did not isolate that aspect in his opinion and findings, is patently a desperate last resort. As we have seen, this complaint was thoroughly scrutinized by the Court of Appeals, on the petition for rehearing, and was peremptorily rejected.

Nor has petitioner been able to discover any other judicial acceptance for its contention. Each of the cases it cites (pp. 6-7 of its petition) involves a situation in which the appellant sought to change the entire nature of the case on the appeal—*e.g.*, from an action on a contract to one in *quantum meruit* [*Weiss* v. *Duro Chrome Corp.*, 207 F. (2d) 298, 300 (C. A. 8th, 1953)], or from a suit for cancellation of a contract to one for reformation [*Brown* v. *Rudberg*, 171 F. (2d) 831 (App. D. C., 1948)]. None of this bears in the slightest on the right of the Court of Appeals to cull from the trial record those aspects of petitioner's negligence which it deemed dispositive. Nor is there anything in its choice of the facts to be emphasized which can bring this case in any way within the already overburdened jurisdiction of this Court.

In an effort to distract the Court from this patent lack of any question worthy of its notice, petitioner has suddenly discovered an alleged conflict with the rule of *The Pennsylvania*. We are somewhat vague as to just how that conflict is supposed to arise; in net effect, however, petitioner insists on a second chance to carry the burden imposed by that Rule.

Under the Rule, petitioner would have to establish that a lookout could not possibly have helped avoid the accident. Let us see what this means. There is no question

that the bridge started opening before the captain saw it opening, and the Court of Appeals so found; indeed, petitioner expressly admitted, in its brief below (p. 23), that "Quite possibly, there was a lapse of some time . . ." between the opening and the captain's observation thereof.

This means that, in order to carry the *Pennsylvania* burden, petitioner would have to establish this at the very least: that an independent lookout who could, unlike the captain, concentrate entirely on being a lookout—whose whole task was to watch for danger—could not possibly have seen the opening when it began, or at any point earlier than the one at which the captain finally awoke.

Impossible as such a burden would be to carry in ordinary circumstances, the facts here are such as to render petitioner's raising of the issue incomprehensible. For petitioner's own evidence in the District Court consisted almost entirely, as we have seen, of the four-year old depositions before the Coast Guard. Since the Sightseer's captain and its mate were both dead before the trial, and no one else, concededly, was taking the slightest interest in the bridge or the river, petitioner is obviously in no position to produce any additional evidence whatever. It cannot possibly carry the *Pennsylvania* burden of establishing that the absence of a lookout "could not have been" a contributing cause of the accident.

Far from rebutting any of this, the petition herein proves our point. For nowhere in the course thereof does petitioner suggest a single example of any additional evidence it could produce at a second trial. Not one fact is even hinted at, as to either the adequacy of the lookout or the need therefor, that is not already a part of the record.

In other words, petitioner demands a new trial to answer a contention it was totally unable to answer in the Court of Appeals, to which it has produced no answer in this Court, and to which, on any view of its witnesses and the conceded facts, it cannot possibly present an answer of any sort.

In short, when this case is boiled down to its true proportions, it becomes a routine instance of a petitioner asking review by this Court, where the only question presented is one of fact. This Court has repeatedly held that it will not review evidence to pass on the correctness of findings of fact. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 178 (1938); *National Labor Relations Board v. Waterman S.S. Corp.*, 309 U. S. 206, 208 (1940). In this case particularly, where there was more than ample record support for the Court of Appeals' resolution of the issue of negligence, there is not the slightest public interest or significance warranting Supreme Court review.

CONCLUSION

The petition for a writ of certiorari to review the judgment of the Court of Appeals should be denied.

March 31, 1961.

Respectfully submitted,

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BEATRICE SHAINSWIT,
Of Counsel.

In the

Supreme Court of the United States

October Term, 1950

No. 776

[illegible] SIGHTSEEING COACHES, INC.

v.

THE CITY OF NEW YORK

In the Matter

of the Petition

of [illegible] SIGHTSEEING COACHES, INC.

for a Writ of Certiorari

[illegible] SIGHTSEEING COACHES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

[illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 779

CIRCLE LINE SIGHTSEEING YACHTS, INC.,
Petitioner,

—against—

THE CITY OF NEW YORK,
Respondent.

In the Matter of
The Petition of CIRCLE LINE SIGHTSEEING YACHTS, INC., as Owner of the motor vessel SIGHTSEER VIII, in a cause of exoneration from or limitation of liability for damages arising out of a collision in the Harlem River on September 6, 1956, between said vessel and the Madison Avenue Bridge,

CIRCLE LINE SIGHTSEEING YACHTS, INC.,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

1.

This is not a negligence case. It is, rather, one concerned with the substantive rights of a litigant under the statutory-burden doctrine of admiralty as expressed by this Court in *The Pennsylvania,* 86 U.S. (19 Wall.) 125, and as so frequently applied by the lower federal courts.

Nor is the case one involving an issue as to the correctness of factual findings. Petitioner is acutely aware of the burden imposed on this Court by the volume of petitions filed for writs of certiorari, and certainly would not presume to make this application except on grounds considered by petitioner and its counsel to be of merit.

Petitioner does not question the power of a Court of Appeals to make, from an appropriately framed trial record, a finding that is inconsistent with or contradictory to a finding made by the District Court; nor does it question the power of a Court of Appeals to draw from findings of fact conclusions that are inconsistent with or contradictory to the conclusions that the District Court drew from those findings.

In this case, for example, the question of compliance by petitioner's vessel with the "Narrow Channel Rule," 33 U.S.C. § 210, was exhaustively litigated in the District Court; in fact, that issue appeared to be the sole interest of respondent until the time of the appeal. The Court of Appeals approved the conclusion of the District Court that petitioner's vessel had not violated the rule (R. II-107a, 108a; App. to Petition A-4, A-5). Had the Court of Appeals reversed the District Court with respect to that conclusion, its act, although patently erroneous, would not for that reason have been an inordinate exercise of appellate power; and if the Court of Appeals had held, further, that petitioner had failed to sustain the burden imposed on it by *The Pennsylvania*, 86 U.S. (19 Wall.) 125, with regard to violation of the "Narrow Channel Rule," it would have been acting within the scope of its power under that decision and *McAllister* v. *United States*, 348 U.S. 19, for petitioner was made aware during the trial that the issue was material and was afforded process by which to sustain the burden.

Petitioner does question most gravely the power of a Court of Appeals, in an admiralty case, to make a finding

from a record that establishes that the factual issue designed to be resolved by such a finding was not brought to the attention of the District Court; for such an act is beyond the extent of the power of the Court of Appeals as specified in *McAllister v. United States*, 348 U.S. 19.

And even more clear is the error of the Court of Appeals, having superimposed its statutory-presumption finding, in concluding that a burden imposed only by that finding had not been sustained. Though it may be assumed that there are circumstances in which a Court of Appeals may properly draw a conclusion from a factual finding that it alone has made, such an act can not be proper in a case where the newly made finding is one of statutory or quasi-statutory violation in admiralty, which creates "the burden . . . of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been," *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 136. For the act of the Court of Appeals in drawing that conclusion is a denial of the right of the statute-violator to carry the burden that this Court has said it must carry.

2.

Petitioner did not undertake in its petition to demonstrate the manner in which it will show, if this Court by an order of remand affords it the opportunity to show, that the finding of the Court of Appeals as to inadequacy of lookout was wrong and that its conclusion respecting the statutory-burden issue was wrong; for petitioner understands such factual argument to be improper in presentation of a petition of this nature.

Whether or not petitioner can prove facts is immaterial; whether or not it may properly be denied the process by which factual proof may be adduced is critical.

3.

Respondent states, at page 6 of its brief in opposition:

> "The Court of Appeals found that there was substantial evidence that a lookout might have seen the opening bridge earlier, and that certainly petitioner had not carried its burden, under the rule of *The Pennsylvania,* 86 U.S. (19 Wall.) 125 (1873), of establishing that the absence of a lookout could not have contributed to the accident."

That inaccurate statement touches the core of the matters presented on this petition. Indeed, if there were such evidence in the record, petitioner would not consider this petition meritorious.

The Court of Appeals made no such finding, although it did conclude (R. II-109a; App. to Petition A-6):

> "In view of the fact that the ship had almost stopped by the time it hit the bridge, it is quite possible that a lookout with no other duties could have seen the opening bridge earlier and either avoided the accident or at least diminished its severity."

On the basis of that conclusion, and that only, the Court of Appeals held that petitioner had failed to sustain the burden of the Pennsylvania Rule.

But, if "it is quite possible" that a lookout could have avoided the accident or diminished its severity, it is also, by definition, possible that a lookout could not have avoided the accident or diminished its severity.

Petitioner asks only that it not be foreclosed from proving that the latter of those possibilities was the fact.

4.

It can hardly be questioned that the matters raised on this petition are of paramount importance to the mari-

time industry. The rule of *The Pennsylvania*, 86 U.S. (19 Wall.) 125, has been and will continue to be a force of far-extending impact on admiralty litigation, affecting virtually every cause of marine collision.

It is essential that the federal bench and admiralty bar enjoy a clear understanding of the meaning and intent of the rule, of the burden that it contemplates, and of the right intended to be afforded to a party to undertake that burden, if it must, and to sustain it, if it can.

Should the present decision of the Court of Appeals be permitted to stand, an admiralty litigant would be compelled, on trial, to raise issue on its own motion as to every conceivable matter of statutory and quasi-statutory conduct concerned however remotely with the incident in question, and then not only to prove compliance but also affirmatively to demonstrate that possible non-compliance could not have been related causally to the incident; failing that, the party would be exposed, as petitioner has been exposed here, to the simultaneous creation and adverse determination of a presumption on appellate review.

Petitioner respectfully renews its prayer that the writ issue, and that, upon its review, this Honorable Court be pleased to order the judgment of the Court of Appeals reversed and these causes remanded for further proceedings consistent with the doctrine stated by this Court in *The Pennsylvania*, 86 U.S. (19 Wall.) 125, and such other and further relief as to this Court may seem proper.

Respectfully submitted.

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ALBERT ROBIN,
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Dated New York, New York
April 11, 1961.